

Daimler-Chrysler Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Petitioner. Case 7-RC-22246

April 18, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND ACOSTA

An election was conducted pursuant to a Stipulated Election Agreement on June 19, 2002. The tally of ballots shows 18 for and 17 against the Petitioner, with no challenged ballots. One of these ballots contains an “X” in the “YES” square, but also includes a handwritten question mark (?) immediately adjacent to the “YES” square. (A copy of the ballot is attached as an appendix.)

The Regional Director counted this ballot as a valid “YES” vote in favor of the Petitioner. In reaching this conclusion, the Regional Director noted that there are no markings in or near the “NO” square. The Regional Director found the question mark insufficient to negate the fact that the voter expressed a clear intent to vote “YES” by marking an “X” in the “YES” square. The Employer disputes this conclusion, contending that Board law states that if speculation is required to ascertain voter intent, the ballot is to be voided.

The National Labor Relations Board has considered the Employer’s objection and the Regional Director’s report and recommended disposition. Based on the facts presented, we agree with the Regional Director’s conclusion.¹

I.

The Board’s primary goal, in a representation election, is to protect the right of individual employees to choose whether or not to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952). Congress has entrusted the Board with a wide degree of discretion to establish the procedures and safeguards necessary to ensure this fair and free choice by employees. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330–331 (1946).

To effectuate this goal, the Board has developed principles that guide our decisions in cases concerning irregularly marked ballots. We adhere to these principles in reaching our decision today.

¹ In view of our disposition of the Employer’s objection, there is no need to pass on the Petitioner’s conditional exception.

First, we assume that by casting a ballot, a voter evinces an intent to participate in the election process and to register a preference. *Horton Automatics*, 286 NLRB 1413 fn. 3 (1987) (“[W]e note that the voter who cast the challenged ballot in issue did more than merely appear at or enter the [polls]; the voter also cast a marked ballot.”);² *Harry Lunstead Designs*, 265 NLRB 799, 800 (1983), quoting *Gregg Moore, Inc.*, 178 NLRB 483, 484 (1969) (“By appearing at the polls, and by casting a marked ballot, it appears that the voter did wish to register his preference.”).

Second, we believe that this preference must be given effect whenever possible. *Hydro Conduit Corp.*, 260 NLRB 1352, 1352 (1982) (referring to the Board’s “longstanding policy of attempting to give effect to voter intent whenever possible”); *Thiele Industries*, 325 NLRB 1122, 1124 (1998); *Brooks Bros., Inc.*, 316 NLRB 176, 176 (1995). When we have strayed from this belief, courts of appeals have been quick to disagree with our decisions. For many years, for example, the Board did not give effect to voter markings made on the back of a ballot, on the ground that the meaning of such markings must be speculative. Typical of these now-overruled cases is *Columbus Nursing Home*, 188 NLRB 825 (1971). There, the ballot had three squares on the front—one for Local 47, one for Local 505, and one for neither. The voter did not place any markings on the front of the ballot, but on the back the voter handwrote an “X” along with the word “neither.” The Board did not count that ballot on the ground that “any conclusions drawn about the voter’s intent based on markings on the back of the ballot must be almost entirely speculative.”³ Id. Facing disagreement from several courts of appeals,³ the Board in *Hydro Conduit Corp.*, supra, overruled the *Columbus Nursing Home* doctrine, observing that a refusal to consider voter intent when marked on the back of the ballot ran contrary to our longstanding policy of effectuating voter intent whenever possible. *Hydro Conduit*, 260 NLRB 1352.

² Although the resolution of the ballot in *Horton Automatics*, supra, resulted in a 3–2 decision of the Board (Chairman Dotson and Members Stephens and Cracraft, voting to count the ballot, Members Johansen and Babson, dissenting) (see fn. 4 below), Member Babson agreed in his dissent with the principle stated above in the text.

³ *NLRB v. Manhattan Corp.*, 620 F.2d 53 (5th Cir. 1980); *Roberts Door & Window Co. v. NLRB*, 540 F.2d 350 (8th Cir. 1976); *Mycalex v. NLRB*, 481 F.2d 1044 (2d Cir. 1973); *NLRB v. Tobacco Processors, Inc.*, 456 F.2d 248 (4th Cir. 1972); and *NLRB v. Titcher-Goettinger Co.*, 433 F.2d 1045 (5th Cir. 1970).

Third, we avoid speculation or inference regarding the meaning of atypical "X"s, stray marks, or physical alterations. See, e.g., *Kaufman's Bakery*, 264 NLRB 225 (1982). Despite the importance of giving effect to voter intent, it is not the Board's role to glean voter intent from ambiguous or contradictory markings on a ballot. We thus speculate neither to divine the intent of a ballot that is not clear, nor to negate the intent of a ballot that is otherwise clear.

Applying these principles, we have held a ballot must be voided where a voter has not registered a mark in either a "YES" or a "NO" square, or has not otherwise made his or her preference clear. In these cases, the Board cannot determine the clear intent of the voter without engaging in speculation. It is thus not possible to give effect to the voter's preference.⁴

The same rule applies when a voter has marked both squares, and neither an erasure or attempted obliteration of the second marking nor other markings on the ballot makes clear the voter's preference. Again, in these cases, we do not speculate as to which mark best represents the voter's intent and are thus unable to count the ballot.⁵

II.

The ballot in this case presents a different situation. Here, by casting a ballot the voter evinced an intent to register a preference, and in fact, did register that preference by placing an "X" in the "YES" square. The ques-

tion presented is whether the question mark outside the square should negate this clear expression of preference.⁶

Our colleagues in dissent contend that the question mark on the ballot raises a reasonable doubt as to the voter's preference, and thus that the ballot should be voided. This conclusion is based on the inference that the voter, by placing a question mark next to the "YES" square, meant to indicate uncertainty regarding his or her vote.

The difficulty with our colleagues' conclusion is that it is necessarily based on speculation as to the voter's intent in adding the question mark. We cannot be certain what meaning—if any at all—the voter may have intended to convey by placing the question mark. The question mark could mean many things. And even if we infer that the question mark was meant to indicate uncertainty about the voter's choice, we cannot be certain just how uncertain the voter was.

What we know, without speculation, is this: The printed instructions on the ballot state: "Mark an 'X' in the square of your choice." The voter marked the "YES" square with an "X" precisely in line with these instructions. The voter did not erase or obliterate the "X" in the "YES" square. Nor did the voter spoil the ballot and then ask the Board agent for a new ballot, an opportunity that the instructions gave him. Instead, the voter chose to cast this ballot as an expression of this preference, and did not leave the polling place without casting a ballot at all. While it is certainly possible that the question mark signifies that the voter had doubts regarding the wisdom of his or her choice, as some voters presumably do, that possibility is not sufficient for the Board to trump what is otherwise a clear expression of voter intent.⁷ Put somewhat differently, even if the voter had ambiguous feelings about his or her choice, the choice itself is not ambiguous.

⁴ In some cases, the voter expresses a clear preference even without registering a mark in either the "YES" or "NO" square. See, e.g., *Horton Automatics*, 286 NLRB 1413 (1987) (the letters "NON" extending across the "YES" and "NO" squares indicate an intent to vote against the union); *Harry Lunstead Designs*, 265 NLRB 799 (1983) (the word "NO" written in both the "YES" and "NO" squares indicates an intent to vote against the union); *Hydro Conduit Corp.*, 260 NLRB 1352 (1982) (the word "si" written on the back of the ballot indicates an intent to be represented by the union). In other cases, the employee's intent cannot be ascertained without undue speculation.

⁵ So-called dual-marked ballots often present difficult decisions. Compare, *Osram Sylvania, Inc.*, 325 NLRB 758 (1998) (a ballot marked with seven "X"s in the "NO" area and a diagonal line, possibly smudged, in the "NO" area, should be counted as a "NO" vote) with *Bishop Mugavero Center for Geriatric Care*, 322 NLRB 209 (1996) (a ballot marked with an "X" in the "NO" square and a diagonal line in the "YES" square is void). Compare *Brooks Bros., Inc.*, 316 NLRB 176 (1995) (where a voter clearly obliterated the "X" in the "YES" square by scratching over it with additional pencil markings, leaving an unmistakable "X" in the "NO" square, the ballot clearly expresses the voter's intent to cast a vote against the union), with *Mercy College*, 212 NLRB 925 (1974) (where a ballot is marked with an "X" in the "NO" square, which has been heavily shaded over, and an "X" in the "YES" square, voter's attempted obliteration is not sufficient to express clearly the intent of the voter).

⁶ The Board could, of course, apply a different rule of decision to these cases, concluding that to further efficient conduct and administration of Board-supervised elections, any deviation from prescribed instructions negates the ballot. See, e.g., *Hydro Conduit Corp.*, 260 NLRB at 1353 ("I am persuaded that any ballot that is not properly marked according to the instructions provided . . . should be invalidated") (Member Fanning, concurring and dissenting); *Columbus Nursing Home*, 188 NLRB at 826 ("Moreover, to count such a ballot would impede the efficient conduct and administration of Board-supervised elections."). This approach, however, is not current Board law.

⁷ The cases on which our colleagues rely do not require a contrary result. Unlike the case at hand, *Bishop Mugavero* and *Mercy College*, supra at fn. 5, are cases where the voter marked both squares. Voter intent in those cases could not be discerned without the Board engaging in speculation to resolve the doubt. That is not the case here.

Whatever reason the voter may have had for placing the question mark, the voter deliberately decided to express a preference by placing an "X" in the "YES" square and, absent a clear negation of this preference, the Board should honor that expression.⁸

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and that it is the exclusive collective-bargaining representative of the voters in the following appropriate unit:

All full-time and regular part-time service engineers employed by the Employer in department 3237 at its Featherstone Road Engineering Center, 2301 Featherstone Road, Auburn Hills, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

CHAIRMAN BATTISTA and MEMBER SCHAUMBER, dissenting.

During an election, a voter cast a ballot which contained an "X" in the "YES" box, but also included a handwritten question mark (?) immediately next to the "YES" box. The issue presented is whether the ballot evidences a clear expression of voter intent to vote for the Petitioner. Contrary to our colleagues, we find that it does not.

The test of whether a ballot is to be counted or not is whether the ballot, considered as a whole, *clearly* expresses the voter's intent. If the ballot "clearly expresses the voter's intent," it is to be counted.¹ If there is doubt as to the voter's intent, the ballot is not to be counted.²

Indeed, our colleagues appear to agree with this test. As they state: "We thus speculate neither to divine the intent of a ballot that is not clear nor to negate the intent of a ballot that is otherwise clear."

There are strong policy considerations to support this rule. The decision of employees to select or reject a bargaining representative is an immensely important decision for the employees, employer, and the union. The

ultimate decision should not be left to Board Member speculation as to a voter's intention. That is, the Board should not be placed in the position of deciding whether the union is selected or not. Rather, as the cases hold, the ultimate decision should rest on the clear expression of the voter.

Applying the rule to the instant case, we conclude that there is a reasonable doubt as to the voter's intent. The voter placed a question mark next to the marked box. A question mark is the very symbol that our language uses to express uncertainty. In the instant case, we may speculate about the basis for the voter's uncertainty. But there can be little doubt as to the uncertainty of the ballot itself.

In addition to the uncertainty that is inherent in the question mark itself, there is an additional uncertainty as well. It could be that the voter *made a clear choice*, but was uncertain about the wisdom of that choice. Or, it could be that the voter never made a clear choice. If it were the former, we would count the ballot. That is, if it were clear that the voter intended a "YES" vote, and the question mark simply indicated his misgivings about that vote (i.e., a "soft yes"), the ballot should be counted. However, if it were the latter, i.e., if the voter did not intend a clear choice, the ballot should not be counted. In the instant case, it is far from clear what the question mark means. As our colleagues say: "The question mark could mean many things." And that is precisely the point. We are left with uncertainty as to what the voter intended.

Our colleagues say that we have improperly drawn the inference of uncertainty. However, it is our colleagues, not us, who have drawn an inference. They infer that the voter simply intended a "YES" vote. In doing so, they have ignored the question mark on the ballot. By contrast, we do not draw any inference. That is, we are simply puzzled by the ballot. Phrased differently, we have a doubt as to the voter's intent.

Our colleagues also state that an employee who casts a marked ballot is presumed to register a preference. They further state that a preference is to be given effect when ever possible. We have no quarrel with either proposition. However, these propositions simply beg the question. The question in this case is ascertaining what the voter's preference was. Since, as discussed above, if that preference is unclear, it cannot be given effect.

In sum, there is reasonable doubt here as to the voter's intent. The law is that if there is a reasonable doubt as to the voter's intent, the ballot is not to be counted. For in

⁸ We observe that neither party in this case has alleged that the question mark is an identifying mark or violates ballot secrecy. Identifying marks provide an exception to the general rule of giving effect to voter intent. A ballot that clearly expresses voter preference will still be rejected if the mark identifies the voter. See *A.G. Parrott Co.*, 237 NLRB 191 (1978), *enfd.* denied on other grounds 630 F.2d 212 (4th Cir. 1980); *Standard-Coosa-Thatcher Co.*, 115 NLRB 1790 (1956).

¹ Citing *Brooks Bros., Inc.*, 316 NLRB 176 (1995). See also *Osram Sylvania, Inc.*, 325 NLRB 758 (1998); *Columbus Nursing Home*, 188 NLRB 825 (1971); *Kaufman's Bakery*, 264 NLRB 225 (1982).



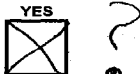

² *Bishop Mugavero Center for Geriatric Care*, 322 NLRB 209 (1996); *Mercy College*, 212 NLRB 925 (1975).

that situation, we simply do not know the voter's clear intent. Since that is the situation here, the ballot is void.³

³ As a practical matter, this result is not a harsh one. A new election can be held in about 3 months, i.e., in June 19 of this year. By contrast, under our colleagues' view, the counting of the ambiguous ballot gives

rise to the seating of the Union for a least 1 year, followed by strict rules for withdrawing recognition (under current law—see *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and (quite possibly) a contract bar of 3 years.

APPENDIX

	UNITED STATES OF AMERICA National Labor Relations Board	
OFFICIAL SECRET BALLOT For certain employees of DAIMLERCHRYSLER CORPORATION AUBURN HILLS, MICHIGAN		
Do you wish to be represented for purposes of collective bargaining by - INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO ?		
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
YES 	NO 	

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.